

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF

CITY OF WEST DES MOINES,  
Public Employer,

and

WEST DES MOINES ASSOCIATION OF  
PROFESSIONAL FIREFIGHTERS, LOCAL  
3586,  
Petitioner.

CASE NO. 5158

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PUBLIC EMPLOYMENT  
RELATIONS BOARD

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) on appeal from a proposed decision and order issued by an administrative law judge (ALJ) concerning the determination of an appropriate bargaining unit pursuant to section 13 of the Public Employment Relations Act (the Act), chapter 20, Code of Iowa (1993). Following a hearing upon the unit determination aspects of a combined unit determination/representative certification petition filed by the West Des Moines Association of Professional Firefighters, Local 3586 (the Association), the ALJ proposed the establishment of a unit which included all full-time career firefighters and career fire lieutenants employed by the City of West Des Moines (the City), and which excluded, *inter alia*, all "volunteer" firefighters. The City appealed from the ALJ's proposal to the full Board.

Pursuant to PERB subrule 621-9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments to the Board were heard on February 2, 1995, Frank B. Harty appearing for the City and Jack Reed for the Association. Both parties filed

briefs on appeal. Pursuant to section 17A.15(3),<sup>1</sup> on this appeal we possess all powers which we would have had had we elected, pursuant to PERB rule 621-2.1, to preside at the evidentiary hearing in place of the ALJ.

Based upon the entire record in this matter, and having considered the parties' oral arguments and briefs, we issue the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT<sup>2</sup>

The City of West Des Moines maintains a "combination" fire department staffed by what the parties refer to as "career" (full-time) and "volunteer" (part-time) personnel. The department's career division consists of, in descending rank order, the fire chief, the fire marshall, two fire lieutenants and 16 firefighters. The volunteer division is made up of three battalion chiefs and a training chief, and in descending rank below them two captains, seven volunteer lieutenants and 53 volunteer firefighters. Having formerly maintained an all-volunteer force, the City has employed career firefighters for approximately six years.

The City maintains three fire stations. Station 1, at 35th and Ashworth, is staffed only by volunteers, but also houses the offices of the fire chief, fire marshall and the department's secretary. Station 2 (14th and Railroad) and the Westside station

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<sup>1</sup>This and all subsequent statutory citations are to the Code of Iowa (1993).

<sup>2</sup>Although the parties presented extensive testimony from a number of witnesses during the evidentiary hearing before the ALJ, we have limited our findings to those facts which we believe to be necessary for a resolution of the disputed issues.

(68th and University) are staffed by both career and volunteer personnel.

The City is provided with 24-hour fire protection through almost daily reliance upon both the department's career and volunteer divisions. From 6:00 a.m. to 6:00 p.m., Monday through Saturday, career employees are scheduled to man both Station 2 and the Westside station. No career employees are scheduled for duty at Station 1. From the conclusion of a career shift at 6:00 p.m. until the commencement of the next career shift, and all day Sundays, firefighting services are provided by the volunteers, each of which is assigned to one of the three stations.

Career shift personnel (firefighters and fire lieutenants) actually man their assigned stations during their duty shift, while volunteers are merely "on call," and report to their stations only in response to an emergency or for a scheduled event.

While the fire chief and fire marshall work 40-hour weeks consisting of eight-hour days Monday through Friday, the remaining career division personnel each are scheduled for a 48-hour week, composed of four 12-hour shifts. Each of two career-staffed stations is scheduled to be manned by six employees during each career shift (two three-man crews) although departmental policy requires that a minimum station complement of four be maintained.

Each of the two fire lieutenants has been assigned by the fire chief to command one of the career-manned stations. During the 48 hours each week when the fire lieutenant is on duty at his assigned station, he is "in charge" of the station and responsible for its

operation. During the two career shifts each week when a fire lieutenant is not on duty, a career firefighter assumes the lieutenant's normal functions. The fire chief visits the career-manned stations only occasionally and irregularly, and only for brief periods of time during career shifts. There is no evidence of the fire marshall spending any of his time at those stations during career shifts. Consequently, neither the fire chief nor the fire marshall regularly observes or directly supervises the work of the career firefighters.

Due to the rotating schedules of the three-man crews assigned to each career station, and the fire lieutenant's inclusion as a member of one of those crews, the lieutenant regularly observes the performance of each career firefighter assigned to that station. One of the fire lieutenant's regular functions is to perform an annual performance appraisal/evaluation of each of the career firefighters assigned to his station.

The fire lieutenant's performance evaluation of the career firefighters is prepared utilizing an established form, the lieutenant's completion of which yields a numerical score for the firefighter's performance during the evaluation period. A composite score of "3" or above is considered satisfactory. The performance evaluation prepared by the fire lieutenant is shared with and signed by the firefighter (who is given the opportunity to make written comments), forwarded to the fire chief for his review and signature and then forwarded to the city's personnel office for insertion in the firefighter's personnel file.

The score resulting from a firefighter's annual performance evaluation appears to be the single determinant of whether a firefighter receives the five percent pay increase which is uniformly granted to employees who have performed satisfactorily during the prior year. Although the fire chief possesses the final authority to change an evaluation score assigned by a lieutenant, the chief is aware that the lieutenants are most familiar with the firefighter's performance and consequently has never changed an evaluation. Instead, it appears that the chief simply examines the content of the evaluation prepared by the fire lieutenant, signs off on the form and passes it on to the personnel office, without conducting any independent review or further investigation of the firefighter's performance during the evaluation period.

As previously mentioned, the department is organizationally divided into career and volunteer divisions. The pay scale for career firefighters ranges between \$25,334 and \$33,571 annually, and restrictions are imposed on their outside employment. Volunteer firefighters, unlike the career personnel, are not regular full-time employees of the City, typically rely on other employment for their livelihood, and are compensated for their service to the City at the base rate of \$2,000 per annum.

Each fire lieutenant is responsible for maintaining his station's minimum staffing requirement during career shift hours. Should circumstances result in a situation where a station is under-manned, additional personnel are summoned by the lieutenant in order to bring the station to the minimum staffing level. Fill-

in help is initially sought from off-duty career firefighters, based upon seniority, but if none are available a volunteer firefighter is secured by the lieutenant to fill in during the career shift. In such cases, the volunteer is compensated for his fill-in service at the minimum career firefighter wage.

Career firefighters participate fully in the city's employee benefit plans, which include longevity pay based upon years of service with the City, City-paid insurance plans and vacation and sick leave benefits. They are covered by the civil service provisions of Iowa Code chapter 400 and participate in the retirement system established by Iowa Code chapter 411.

Volunteer firefighters may elect to participate in the City's group insurance plans, but at their own expense. They receive no vacation or sick leave benefits available to full-time City employees and are covered by neither Iowa Code chapter 400 nor chapter 411. Unlike career personnel, volunteers receive no longevity pay, but instead participate in the City's volunteer recognition program which annually rewards volunteers with Series EE savings bonds in amounts determined by their years of service.

In the broad sense, the function of both volunteer and career firefighters are the same -- each group provides fire suppression services within the City of West Des Moines. Both groups utilize the same firefighting equipment, and although not a regular occurrence, may on occasion work together at the same fire scene.

The hiring process for career and volunteer firefighters differs substantially. Career firefighters are subject to civil

service hiring procedures, while volunteers are not. Career firefighters must have obtained Firefighter I and Emergency Medical Technician-Defibrillator (EMT-D) certifications prior to their employment. EMT-D status is not required of volunteers, and volunteers are not required to have Firefighter I certification prior to their employment, although they must obtain the status during the next six months. Career firefighter applicants, unlike volunteers, also undergo a pre-employment psychological examination, and are required to pass a different physical agility test than the volunteers.

Both career and volunteer firefighters obtain Firefighter I certification by completion of training at one of two "fire academies." Career firefighters are now required to complete a regional academy (drill school) which yields firefighter certification, and although some current volunteers have in fact attended that academy in the past, West Des Moines also operates its own fire academy which provides substantially similar training. It appears that approximately one-half of the career firefighters received their training at West Des Moines' internal academy, prior to the establishment of the regional academy now required for career personnel. Volunteers not possessing Firefighter I certifications now receive their training at the West Des Moines academy. There is evidence that the training received by the two groups concerning bloodborne pathogens is not the same, and there is no evidence that volunteers are the subject of annual performance evaluations, as are the career firefighters, or that

they are subjected to the City's established progressive discipline system.

Although on occasion both career and volunteer firefighters work the same fire scene, and are thus then subject to common supervision by the officer in command, in the normal course of events the career firefighters work under the career officers, while the volunteers work under the volunteer chain of command.

The functions performed by both career and volunteer firefighters which are directly associated with fire suppression are characterized by their similarities rather than their differences. For instance, both groups utilize the same equipment, techniques and strategies in their responses to emergency situations, and both are responsible for returning their equipment to ready status at the conclusion of an emergency response.

Volunteer firefighters are required to attend weekly three-hour drills in order to remain in good standing. Included within such drills is the volunteers' performance of "house duties" also regularly (and more frequently) performed by career firefighters, such as routine equipment checks and maintenance. It seems clear, however, that differences do exist between the normal duties of the two groups. For example, career firefighters are required to maintain the station lawns and engage in pre-planning activities such as fire inspections and the preparation of map books for use in a later emergency -- duties not borne by the volunteers. Additionally, at least some career firefighters participate in fire



investigations and department-conducted fire safety education programs for the public, functions not performed by the volunteers.

#### CONCLUSIONS OF LAW

The two issues strenuously litigated by the parties in this case are 1) whether an appropriate bargaining unit within the meaning of section 20.13(2) consists of career firefighters only, the result sought by the Association and proposed by the ALJ, or whether the unit should also include volunteer firefighters, as urged by the City, and 2) whether career lieutenants are supervisors excluded from the Act's coverage by section 20.4(2).

##### I. The Bargaining Unit Issue

The Association argued, as a threshold matter, that the so-called "volunteer" firefighters should be excluded from the unit because they are not "public employees" within the meaning of section 20.3(10).

Section 20.3(10) defines a "public employee" as:

...any person employed by a public employer, except individuals exempted under the provisions of section 20.4.

We concur with the ALJ that the designation "volunteer firefighter" is a misnomer in this case. A "volunteer" is "[a] person who gives his services without any express or implied promise of remuneration."<sup>3</sup>

The so-called "volunteer" firefighters here are paid by the City to attend weekly drills and to be "on-call" to respond to

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<sup>3</sup> Black's Law Dictionary, Fifth Edition, 1979, p. 1413..

emergencies. They are clearly "employed by" the City within the meaning of section 20.3(10), and are not excluded from the Act's coverage or from potential inclusion in an otherwise-appropriate bargaining unit.<sup>4</sup>

Section 20.13(1) authorizes PERB to define the appropriate collective bargaining unit, and section 20.13(2) provides the following criteria for making the unit determination:

In defining the unit, the board shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the existence of a community of interest among public employees, the history and extent of public employee organization, geographical location, and the recommendations of the parties involved.

As recognized by the Iowa Supreme Court in Anthon-Oto Community School District v. PERB, 404 N.W.2d 140 (Iowa 1987), the Board's duty in determining the appropriate unit is to consider all of the factors set out in section 20.13(2), giving appropriate weight to those it deems most relevant under the circumstances.

The court stated:

It is axiomatic that a statutory scheme which calls for a case-by-case analysis would be rendered meaningless by an application of rigid rules based solely on prior decisions. Rather, we deem such a scheme to require consistency in reasoning and weighing of factors leading to a decision tailored to fit the particular facts of the case.<sup>5</sup>

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<sup>4</sup> We do not address here the issue of whether true volunteer firefighters may be excluded from coverage.

<sup>5</sup> Anthon-Oto Community School District v. PERB, 404 N.W.2d 140, 144 (Iowa 1987).

As recognized by the City in its brief, the controlling factor for the Board's determination in this case is the "community of interest" factor.<sup>6</sup> An examination of the other section 20.13(2) criteria reveals that none is critical in determining the appropriate unit under the record in this case.

The Iowa Supreme Court has defined the "efficient administration of government" standard as requiring

... the designation of the fewest number of bargaining units possible consistent with the requirement that employees be permitted to form organizations of their own choosing to represent them in a meaningful and effective manner.<sup>7</sup>

The City's costs for bargaining and administering separate labor contracts for career and volunteer personnel would no doubt be greater than those incurred for a single contract. However, there is little or no evidence to suggest that any increased cost which might be incurred, even should separate units ultimately be certified, is of great significance in relationship to the size and employment complement of the City. Accordingly, we conclude that this factor is not determinative.

There is no evidence in the record (or argument by the parties) to suggest that history of public employee organization is a significant factor in this case. While the extent of public employee organization (i.e., consideration of the group of

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<sup>6</sup> City's Brief on Appeal, p.6.

<sup>7</sup> Anthorn-Oto Community School District v. PERB, 404 N.W.2d, 104, 143 (Iowa 1987).

employees on which the union has focused its organizing efforts),<sup>8</sup> supports the determination of a unit consisting only of the career firefighters, the extent of organization should not be the controlling factor in unit determination cases.<sup>9</sup>

With regard to the "geographical location" factor, volunteer and career firefighters both serve the same "geographical location" -- the municipality of West Des Moines -- and at least some of the volunteers are technically "assigned" to locations (stations) which are also manned by career personnel. We note that this commonality is not complete, however (since Station 1, to which some volunteers are assigned, is not manned by career firefighters), and further note that any significance of the groups' partial assignment to common stations is reduced by the fact that the volunteers do not regularly man those stations, but merely report there for drills or in response to emergency calls. This factor is not determinative.

With regard to the "recommendations of the parties" criteria, if the parties are in agreement as to the appropriate unit, the Board will generally give controlling weight to this factor and will likely approve any such stipulated unit as long as its composition is not plainly repugnant or inimical to the statute.<sup>10</sup> If the parties disagree as to the appropriate unit, however, as in

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<sup>8</sup> Spencer Municipal Hospital, 94 PERB 4749 and 4799, pp 18-19.

<sup>9</sup> Id., p.21.

<sup>10</sup> Spencer Municipal Hospital, 94 PERB 4749 & 4799, at p. 11.

the present case, the Board generally gives this factor little or no weight in making the unit determination.<sup>11</sup>

We agree with the ALJ that the "community of interest" factor is controlling in this case, and that it weighs in favor of the Association's position.

The Board has recognized that "community of interest" includes such factors as similarity of employee duties, skills, qualifications, methods of compensation, benefits, hours of work, work year, common supervision, and employee contact with other employees.<sup>12</sup>

Career and volunteer firefighters must possess similar education and skills to be a firefighter. Career and volunteer firefighters, as a condition of employment, are required to have a high school diploma or equivalent, and they are also required to attend a fire academy. There is no dispute that, at a fire scene, career and volunteer firefighters perform the same job and assume the same risks. We thus agree with the City that, at a fire scene "a firefighter is a firefighter," providing a vital service to the citizens of West Des Moines. However, when "community of interest" factors are applied to the totality of the career and volunteer firefighters' employment relationship with the City, this criterion does not support a combined career and volunteer firefighter bargaining unit.

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<sup>11</sup> See, e.g., Anthon-Oto Community School District v. PERB, supra, 404 N.W.2d at 143.

<sup>12</sup> Des Moines Independent Community School District, 75 PERB 21, 125 & 126.

The civil service commission, by law, controls the career firefighters' appointment (hiring) criteria, promotional examinations and procedures, seniority rights, discharge, demotion, and suspension rights and procedures.<sup>13</sup> Career firefighters are covered by a statutory retirement system, and career personnel are required by law to retire at age 65. Career and volunteer firefighters have significant annual salary differences, and very different employer-provided benefit packages. Except in the infrequent occasions where members of both groups are at the same fire scene, career and volunteer personnel do not operate under common supervision. They do not have the same daily work station duties and responsibilities. Career and volunteer firefighters have different hours of work, and have little daily contact with each other on any regular basis. We also cannot ignore the fundamental distinction that service as a firefighter is the primary occupation and source of income and benefits for the career firefighter, unlike most, if not all, of the volunteers.

Based on our examination of all of the section 20.13(2) factors, we conclude that the appropriate bargaining unit in this case excludes "volunteer" firefighters.

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<sup>13</sup> See City of Iowa City, 82 PERB 1817 & 1920. (Where dispatchers did not have civil service protection, the Board concluded they lacked a community of interest with police officers.)

## II. The Supervisory Issue

The remaining issue for our determination is whether career lieutenants are supervisory employees excluded from the Act's coverage by section 20.4(2):

The statute defines supervisory employee:

Supervisory employee means any individual having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

In City of Davenport v. PERB, 264 N.W.2d 307 (Iowa 1978), the Iowa Supreme Court enunciated the following principles for determining supervisory status:

The determination is ordinarily a fact question. It involves a case-by-case approach in which the agency gives practical application of the statute to the infinite and complex gradations of authority which may exist in employment.

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The enumerated functions in the definition of supervisor are listed disjunctively; possession of any one of them is sufficient to make an employee a supervisor. The power must exist in reality, not only on paper. However, it is the existence of the power and not its exercise which is determinative. What the statute requires is evidence of actual supervisory authority "visibly translated into tangible examples."...<sup>14</sup>

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<sup>14</sup> City of Davenport v. PERB, 264 N.W.2d 307, 313-314 (Iowa 1978)

The supervisory authority to "effectively recommend" within the meaning of section 20.4(2) has been defined as a decision which:

... is made at the chief executive level or below, and is approved by higher authority without independent review or de novo consideration as a matter of course.<sup>15</sup>

In the present case, we concur with the ALJ that career lieutenants are not supervisors based on their authority to hire, transfer, suspend, layoff, recall, promote or discharge employees, or based on their authority to adjust grievances.

With respect to the authority/responsibility to reward employees, however, we disagree with the ALJ's conclusions, and find that the career lieutenants are supervisors based on this criterion.

The career lieutenants conduct the performance evaluations for career firefighters and exercise independent judgment in doing so. Although conducting evaluations is not itself a statutory supervisory criterion, see, e.g., City of Pella, 88 H.O. 3620, merit pay increases given to career firefighters are based solely on the results of the performance evaluations prepared by the lieutenants. If the firefighter receives an evaluation score of "3" or above, the firefighter receives the increase. If the firefighter receives a score below "3", no merit increase is granted. Although the evaluations prepared by the career lieutenants pass across the fire chief's desk for his review and

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<sup>15</sup> See, e.g., Davenport Community School District, 76 PERB 72, at p.4.



signature en route to the city's personnel office, the record reveals that the chief, recognizing that the lieutenants are in the best position to know the strengths and weaknesses of the firefighters assigned to his station, does not conduct an independent review or give de novo consideration to the evaluation.

Accordingly, we conclude that the career lieutenants, using their independent judgment in a manner which is not merely routine or clerical, effectively recommend the reward of career firefighters and are supervisors excluded from the coverage of the Act on this basis.

We also believe that the record here presents a closer case than was recognized by the ALJ for the proposition that career lieutenants are supervisory based upon their authority to assign and direct employees. While reasonable minds might certainly disagree as to whether this record shows the lieutenants to be leadpersons within the Act's coverage or true supervisors based upon their exercise of the authority to assign and direct, we need not resolve the issue in this case. As previously noted, the supervisory definition is in the disjunctive, and possession of only one of the supervisory functions is sufficient to confer supervisory status. Having concluded the lieutenants are supervisors based on one of the statutory criteria, we need not reach the issue of whether additional factors also would produce such a result.

Based on the foregoing Findings of Fact and Conclusions of Law, we conclude that the following constitutes an appropriate

bargaining unit of employees employed by the City of West Des Moines within the meaning of section 20.13(2):

INCLUDED: All Full-Time Career Firefighters.

EXCLUDED: Fire Marshall, Fire Chief, Career Lieutenants, Volunteer Officers and Firefighters, and all others excluded by section 4 of the Public Employment Relations Act.

Accordingly, we issue the following:

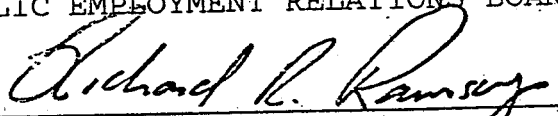
ORDER

IT IS HEREBY ORDERED that a representation election be conducted under the supervision and direction of the Public Employment Relations Board, at a time and place to be determine by the Board. Eligible to vote are all employees in the above-described bargaining unit who are employed during the payroll period immediately preceding the date below and who are also employed in the bargaining unit on the date of the election.

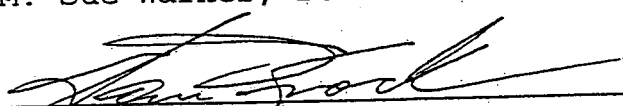
IT IS FURTHER ORDERED that the City of West Des Moines submit to the Board within seven days an alphabetical list of the names, addresses and job classifications of all eligible voters in the unit described above.

DATED at Des Moines, Iowa this 26<sup>th</sup> day of May, 1995.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
Richard R. Ramsey, Chairman

  
M. Sue Warner, Board Member

  
Dave Knock, Board Member